STATE OF MICHIGAN

COURT OF APPEALS

ERB LUMBER, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

MAURICE MORTIER and PAULINE MORTIER,

Defendants-Appellees/Cross-Appellants,

and

JASON MORTIER, JASON MORTIER d/b/a THE FITTING OUT COMPANY, SUSAN PASHUKEWICH, EDWARD J. PASHUKEWICH, WILFRED N. BRUNK, DEBRA LEE SCHOU, MICHIGAN DEPARTMENT OF COMMERCE and HOMEOWNERS CONSTRUCTION LIEN RECOVERY FUND,

Defendants.

UNPUBLISHED
January 5, 1999

No. 204207
Washtenaw Circuit Court
LC No. 96-006670 CH

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiff Erb Lumber, Inc. filed suit against defendants Maurice and Pauline Mortier to recover on their personal guaranty for amounts due on the account of The Fitting Out Company ("the Company"). The trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), but limited the recovery to $3,000. We affirm in part and reverse in part.

I. Basic Facts and Procedural History

Defendants, doing business as the Company, executed a document with plaintiff entitled "30 Day Confidential Credit Application and Sales Agreement." This document contained three separate

items: a credit application; a sales agreement authorizing a monthly account with interest to accrue at an annual rate of 20.4%; and a "Personal Guarantee [sic]" The following statement appears near the top of the document:

> This agreement *and guaranty* hereunder cover purchases made from any division or subsidiary of seller. [Emphasis supplied].

Jason M. Mortier, a codefendant who is apparently defendants' son but who is not a party to this appeal, and the Company are identified as the purchaser at the top portion of the document. Jason Mortier is identified as an individual, while the Company is identified as a business. Defendants identified the Company as a "Co-Partnership," that had been in existence for over seventeen years. Defendants also identified themselves and Jason Mortier as the "principal owners, stockholders, or general partners" of the business. Defendants signed the "terms of payment" portion of the credit agreement as president and vice-president.[1] Jason Mortier also signed the terms of payment section.

The credit agreement also contains a proposed credit limit:

> WE EXPECT OUR MONTHLY CREDIT REQUIREMENTS FROM ERB LUMBER CO. TO BE APPROXIMATELY: $1000.00 - 3000 [sic].

In addition, the following handwritten notation appears near the upper right hand corner of the credit agreement: "LIMIT 1000.00 [unintelligible initials] 9/15/89." The parties dispute the effect of both the monthly credit requirements and the handwritten notation.

The document also included a separate "Personal Guarantee [sic]":

> THE UNDERSIGNED, JOINTLY AND SEVERALLY, PERSONALLY GUARANTEES THE PAYMENTS, WHEN DUE, OF ANY PURCHASES BY SAID APPLICANT AND/OR CORPORATION, THIS BEING DONE IN CONSIDERATION OF, AND AS AN INDUCEMENT FOR, THE EXTENSION OF CREDIT TO SAID APPLICANT AND/OR CORPORATION. SHOULD THE WIFE SIGN AS GUARANTOR HEREIN SHE DOES SO BECAUSE SHE IS PERSONALLY INTERESTED IN THE SUCCESS OF THE APPLICANT HEREIN.

Both defendants signed as personal guarantors for the Company and plaintiff subsequently sold lumber supplies to the company on credit under the credit agreement. Defendants stated that they transferred ownership of the company to Jason Mortier, in August of 1990. Defendants contend that they advised plaintiff of the sale of the business to Jason Mortier and revoked their personal guaranty in a letter dated August 23, 1990. This letter stated:

> Please be advised as of this date, August 23, 1990, the business known as THE FITTING-OUT COMPANY, a co-partnership, has been sold to JASON M. MORTIER and has been registered as a sole-proprietorship, THE FITTING-OUT COMPANY. Jason will be responsible for all assets and liabilities of the company.

> While we will have no further business interest in The Fitting-Out Company we will continue to regard Erb Lumber as our personal building materials supplier, and continue to recommend Erb Lumber to our friends and business associates.
>
> We believe The Fitting-Out Company, with Jason at the helm and with Erb Lumber as the principal building materials supplier, has a good future of growth and profit. We wish you both continued success.
>
> Thank you again for your cooperation.[2]

After the transfer of the Company to Jason Mortier, defendant Maurice Mortier remained active in the business by earning sales commissions, writing checks for the Company, bidding jobs for the Company and interacting with plaintiff on behalf of the Company. Plaintiff sold supplies to the Company under the credit agreement until April 1995, at which time the Company was in several months' arrears. Plaintiff sent letters to defendants in November, 1995, to enforce the personal guaranty. Defendant Maurice Mortier admits receiving the letters but claims he did not read them.

In February of 1996, plaintiff filed a two-count complaint to collect the debt. Count I was to foreclose a claim of lien against property owned by defendants Susan Pashukewich, Edward J. Pashukewich, Wilfred N. Brunk and Debra Lee Schou in the amount of $4,362.92 for pole barn supplies provided by plaintiff and installed on the property by the Company. Count I also included a claim against the Michigan Department of Commerce Homeowners Construction Lien Recovery Fund pursuant to MCL 570.1201 *et seq*.; MSA 26.316(201) *et seq*. Count II was to collect the underlying debt of $51,409.96 and was directed at defendants Jason Mortier, individually and doing business as the Company, and at defendants Maurice Mortier and Pauline Mortier. The trial court entered an order dismissing Count I in April of 1996 with prejudice and without costs. The trial court entered a second order that dismissed Count I as to defendants Brunk and Schou only on May 6, 1996.[3]

Plaintiff obtained a consent judgment against Jason Mortier and the Company in September of 1996 in the amount of $52,819.95. Jason Mortier subsequently filed bankruptcy. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants responded by requesting summary disposition pursuant to MCR 2.116(I)(2) and (C)(10). At the motion hearing, the trial court concluded:

> *THE COURT*. All right. The document which is claimed to be a revocation and guarantee indicates that Jason, the son would be responsible for all the assets and liabilities of the company. And that may well have put Erb on notice that the liabilities of the company were primarily going to be Jason's but it is the liabilities of the guarantors which are not mentioned here as distinct – personally as distinct from the company.
>
> So, I am going to grant the Plaintiff's motion for summary disposition as to the guarantee. I do however, feel that the guarantee that the terms of the guarantee are limited to a maximum of $3,000 and so I'm going to grant summary disposition and will issue a judgment in that amount against the guarantors.

In its order, the trial court granted plaintiff's motion for partial summary disposition, finding that defendants had not revoked their guaranty to plaintiff. The trial court also granted defendants' motion pursuant to MCR 2.116(I)(2) and limited their liability under the guaranty to $3,000. Plaintiff filed an appeal as of right, and defendants filed a cross-appeal.

II. Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). "Courts are liberal in finding a genuine issue of material fact." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. See, e.g., *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

III. The $3,000 Limit On The Personal Guaranty

Plaintiff contends on appeal that defendants' liability under the personal guaranty is not limited to $3,000. We agree. Defendants' liability as guarantors is based upon an independent, collateral agreement by which they undertook to pay the obligation if the primary payor failed to do so. See *First National Bank & Trust Co of Ann Arbor v Dolph*, 287 Mich 219, 225; 283 NW 35 (1938), quoting *In re Kelley's Estate*, 173 Mich 492, 498; 139 NW 250 (1913). "In construing a contract of guaranty, the intention of the parties governs." *Miller Industries Inc v Cadillac State Bank*, 40 Mich App 52, 55; 198 NW2d 433 (1972). "In determining what those intentions are, the court must consider not only the language of the contract, but also the situation and the circumstances of the parties at the time the contract was made." *Id.* Further, defendants are not liable beyond the express terms of their guaranty contract. *Columbus Sewer Pipe Co v Ganser*, 58 Mich 385, 391; 25 NW 377 (1885).

Defendants' contention that the credit application, sales agreement and personal guaranty are a single contract that limits their personal guaranty to either $1,000 or $3,000 is not persuasive. The credit application and sales agreement that defendants executed states that it contains both an agreement and guaranty and includes separate signature lines for each section. The Company and Jason M. Mortier are listed as the applicants for the credit and sales agreement. Defendants executed the credit

application and sales agreement in their capacity as owners of the Company, while they executed the personal guaranty in their individual capacities. Further, the guaranty portion of the document states that the guaranty is, "being done in consideration of, and as an inducement for, the extension of credit to said applicant." Contrary to defendants' contention, their guaranty is not limited to a specific dollar amount. Rather, the express terms of their guaranty limit defendants' liability to "the payments, when due, of any purchases" by the Company. Accordingly, we hold that defendants are liable for the amount of purchases made by the Company, that the trial court established in its consent judgment against Jason Mortier and the Company as $52,819.95.

IV. Revocation of the Personal Guaranty

Defendants contend in their cross-appeal that they revoked their personal guaranty to plaintiff when they sent the August 23, 1990, letter to plaintiff. We disagree. A party's intent to revoke a guaranty must be "in clear and unequivocal language which could not reasonably be misunderstood." *American Steel & Wire Co v Richardson*, 191 Mich 549, 553-554; 158 NW 34 (1916). "The test is not what [the party] meditated, but what [the party] declared." *Id.* at 554. Defendants' August 23, 1990, letter did not revoke their personal guaranty. Defendants' letter did not state that they terminated or revoked the continuing guaranty or that they did not intend to be bound by it. As a result, the letter fell far short of the "clear and unequivocal" statement of termination required by *Richardson*. We agree with the trial court's observation that defendants' letter, if received by plaintiff, "may well have been sufficient to put [plaintiff] on notice that the liabilities of the company were primarily going to be Jason's but it is the liabilities of the guarantor which are not mentioned here as distinct – personally as distinct from the company." Although defendants' letter may have been intended to revoke the guaranty, their mere intention to revoke is insufficient.

Defendants also contend in their cross-appeal that under the *Richardson* opinion, plaintiff was required to investigate and determine whether their August 23, 1990, letter was intended to revoke the personal guaranty. We again disagree. The Michigan Supreme Court's opinion in *Richardson* places the burden on the guarantor to notify the creditor of the guarantor's intention to revoke the guaranty. *Richardson, supra* at 550-555. The Court in *Richardson* implicitly expressed that the fact that the creditor tried to confirm the guarantor's intention was not dispositive and did not obviate the guarantor's initial duty to inform the creditor of his intent to revoke. See *id.* at 555. Although defendants present no authority to support the proposition that they could orally revoke their guaranty, they contend that they discussed the revocation of the guaranty with plaintiff's employees. Even if an oral revocation were to be found valid, defendants failed to show that their discussions with plaintiff's employees constituted a "clear and unequivocal" statement to terminate the guaranty.[4] Defendants have failed to show that a genuine issue of disputed fact exists as to whether they revoked the guaranty. Accordingly, we hold that the trial court properly granted plaintiff's motion for summary disposition.

Finally, defendants contend in their cross-appeal that the personal guaranty expired. This issue was not addressed by the trial court and has not been preserved for appeal. See *Phinney v Perlmutter*, 222 Mich App 513, 556-557; 564 NW2d 532 (1997). Accordingly, we decline to address this unpreserved issue.

Affirmed in part and reversed in part. We remand this case to the trial court to enter judgment in favor of plaintiff in the amount of $52,819.95. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] Nothing in the record indicates why defendants identified themselves as officers, rather than partners, in the partnership.

[2] Plaintiff contends that it never received the letter, but admitted receipt of the letter for purposes of its motion for summary disposition.

[3] The record does not reflect what amount, if any, plaintiffs received in regard to its lien foreclosure action in Count I; however, plaintiff states that this count was settled before April 18, 1996.

[4] In so holding, we do not address the issue of whether defendants could orally revoke their written guaranty. We simply state that the content of the alleged oral revocation that appears in the record was deficient under the "clear and unequivocal" standard set forth in *Richardson*.